



Advisory Opinion 08-018

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2007). It is based on the facts and information available to the Commissioner as described below. All public data the Commissioner relied upon to issue this opinion are available for public inspection and copying at the office of the Information Policy Analysis Division (IPAD), unless the data have been disposed of in compliance with the state Records Management Act.

Facts and Procedural History:

On May 8, 2008, IPAD received a letter, dated May 6, 2008, from John P. Borger. In his letter, Mr. Borger asked the Commissioner, on behalf of his client the Pharmaceutical Research and Manufacturers of America (PhRMA) to issue an advisory opinion whether the members of the Drug Formulary Committee (DFC) at the Department of Human Services (DHS) had violated the Open Meeting Law, Minnesota Statutes, Chapter 13D (OML). In a letter to Mr. Borger dated May 13, 2008, IPAD requested additional information. The additional information was received by IPAD on June 9, 2008. Mr. Borger submitted the \$200.00 fee required by section 13.072.

On June 12, 2008, IPAD wrote to Dr. William Korchik, Chairman of the DFC. In its letter, IPAD informed Dr. Korchik of Mr. Borger's request and gave the members of the DFC an opportunity to explain their position. The members of the DFC presented their position in a letter from their attorney, Sarina L. Turner, dated July 10, 2008.

A summary of the facts as presented is as follows.

Representatives of PhRMA have attended DFC meetings and provided comments on agenda items. In late 2007, Linda Carroll-Shern, Senior Regional Director for PhRMA sent a letter to Cal Ludeman, Commissioner of DHS. In that letter, Ms. Carroll-Shern raised several concerns about how the DFC meetings were being conducted including, among other things, the applicability of certain provisions of the OML. Commissioner Ludeman responded in a letter dated January 2, 2008, indicating that the members of the DFC were not subject to the OML because they do not transact public business.

Issues:

Based on Mr. Borger's request, the Commissioner agreed to address the following issues:

1. Are the members of the Drug Formulary Committee subject to the requirements of the Open Meeting Law, Minnesota Statutes, Chapter 13D?
2. Are the members of the Drug Formulary Committee in compliance with the Open Meeting Law, Minnesota Statutes, Chapter 13D, when they gather together before each regular meeting behind closed doors?
3. Are the members of the Drug Formulary Committee in compliance with Minnesota Statutes, section 13D.01, subdivision 6 when they review printed materials at a meeting but do not make those materials available to the public in the meeting room?

Discussion:

To provide a context for the issues presented in this opinion, a review of the Minnesota Supreme Court's general interpretation of the OML is of assistance. The court has recognized several purposes for the OML. The Minnesota Supreme Court stated in *Prior Lake American v. Mader*, 642 N.W.2d 729 (Minn. 2002) that:

The Open Meeting Law serves several purposes:

(1) "to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning [public bodies'] decisions or to detect improper influences"; (2) "to assure the public's right to be informed"; and (3) "to afford the public an opportunity to present its views to the [public body]." *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 4 (Minn. 1983)(citations omitted). These purposes are deeply rooted in the fundamental proposition that a well-informed populace is essential to the vitality of our democratic form of government. (footnote omitted)

Because the Open Meeting Law was enacted for the public benefit, we construe it in favor of public access. *State by Archabal v. County of Hennepin*, 505 N.W.2d 294, 297 (Minn. 1993); *see St. Cloud Newspapers*, 332 N.W.2d at 6 (stating that the Open Meeting Law "will be liberally construed in order to protect the public's right to full access to the decisionmaking process of public bodies").

Prior Lake American at 735. *See also Star Tribune Co. v. Univ. of Minn. Board of Regents*, 683 N.W.2d 274, 280 (Minn. 2004). With this background and the Court's instruction to construe the law in favor of public access, the next step is to review the issues presented by Mr. Borger on behalf of PhRMA.

Issue 1: *Are the members of the Drug Formulary Committee subject to the requirements of the Open Meeting Law, Minnesota Statutes, Chapter 13D?*

The DFC is a legislatively-mandated committee whose members are appointed by the Commissioner of DHS, a state agency. DHS is directed to provide staff to support the DFC's

work. See Minnesota Statutes, section 256B.0625, subdivision 13c. The part of section 13D.01, subdivision 1 that applies to state agencies is found in paragraph (a). Unfortunately, the layout of the language in subdivision 1 of section 13D.01 and the lack of definitions for some of the terms make the analysis difficult.

Before analyzing the language, the Commissioner encourages the Legislature to review the language in subdivision 1 of section 13D.01 both for clarity and to determine whether modifications are needed to address the increased use of committees and boards by state agencies since the language in subdivision (a) was adopted in 1973. As more advice and recommendations are coming from those with expertise or interest in particular subjects through boards and committees, state agencies and other units in the executive branch need clearer direction about when the OML applies.

The pertinent language in subdivision 1 states:

All meetings, including executive sessions, must be open to the public
 (a) of a state
 (1) agency,
 (2) board,
 (3) commission, or
 (4) department,
 when required or permitted by law to transact public business in a meeting; . .
 . .

Both Mr. Borger and Ms. Turner agree that the resolution of this issue is dependent on whether the members of the DFC are “transacting public business.” To better answer this question, some background information is helpful.

Chapter 256B of Minnesota Statutes is entitled “Medical Assistance for Needy Persons” and is a different program than medical assistance for the elderly. Because the DFC is established in Chapter 256B, it operates in support of the medical programs that serve the needy in Minnesota.

The individuals appointed to the DFC by the Commissioner of Human Services must meet one of the following credentials:

1. Three physicians licensed in Minnesota and actively practicing medicine
2. One physician licensed in Minnesota with an active practice that treats people with mental illness
3. At least three pharmacists licensed in Minnesota who are actively practicing their profession
4. One consumer representative
5. An unspecified number of health care professionals licensed in their field with recognized knowledge in the “. . . clinically appropriate prescribing, dispensing, and monitoring of covered outpatient drugs.”

See section 256B.0625, subdivision 13c. The committee members cannot be employees of DHS. Subdivision 13c also states that the DFC is to “. . . carry out duties as described in subdivisions 13 to 13g [of section 256B.0625].”

The duties assigned to the DFC are as follows. References in the list below to “Commissioner” refer to the Commissioner of DHS.

- A. Consult about which over-the-counter drugs medical assistance will cover if they are prescribed (subdivision 13).
- B. Review and comment on the drug formulary established by the Commissioner (subdivision 13d).
- C. Consult with the Commissioner on the list of specialty pharmacy products that must be obtained from specific providers that have negotiated a lower reimbursement rate with the Commissioner. Covered conditions include: multiple sclerosis, HIV/AIDS, transplantation, hepatitis C, growth hormone deficiency, Crohn’s Disease, rheumatoid arthritis and certain forms of cancer (subdivision 13e).
- D. Review and recommend which drugs will require prior authorization (subdivision 13f).
- E. Establish general criteria to be used for the prior authorization of brand-name drugs when there are generically equivalent drugs available (subdivision 13f).
- F. Recommend drugs that should have prior authorization (subdivision 13f).
- G. Conduct a review of a drug to determine if it should require prior authorization when requested by the Commissioner (subdivision 13f).
- H. When a drug requires prior authorization, receive information on the impact on: the quality of patient care, program costs, whether the drug is subject to clinical abuse or misuse, and relevant data from the state Medicaid program, if available. The DFC must review the drug and hold a public forum to receive public comment (subdivision 13f).
- I. Recommend general criteria to be used for prior authorization drugs to the Commissioner (subdivision 13f).
- J. Consult with the Commissioner about additions, deletions and modifications to the preferred drug list which are the drugs that do not require prior authorization (subdivision 13g).

In performing these duties, the members of the DFC apply their expertise to information received and make choices that are then sent to the Commissioner of Human Services for use in providing medicine to the poor in Minnesota that are paid for with federal and state dollars.

The question to be answered is whether the members of the DFC are “transacting public business.” This phrase is not defined and so it is interpreted according to “common and approved usage.” Minnesota Statutes, section 645.08(1). Several factors direct the Commissioner to conclude that the members of the DFC are transacting public business.

First, several of the assigned duties have been mandated by the Legislature by the use of the word “shall.” Second, the drug formulary is established without having to comply with the rulemaking process (see section 256B.0625 subdivision 13d(a)) and so the DFC provides comment that would otherwise come from the public during the rulemaking process.

Third, Minnesota courts have concluded that the OML applies to a public body even if no decision or action is taken. See *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty Schools*, 332 N.W.2d 1 (Minn. 1983). Fourth, the DFC has been holding its meetings so the public can attend and has allowed attendees to participate in discussions. Fifth, the influence the DFC has on the policies set by the Commissioner of Human Services that direct the provision of medical care to the needy in Minnesota affects how taxpayer dollars are spent and so is public business.

Evaluating all of the information about the role and responsibilities of the DFC, the impact the members' advice has on the provision of medical care to the needy in Minnesota, and following the Supreme Court's direction to interpret the OML in favor of public access, the Commissioner concludes that the members of the DFC are subject to the OML.

Issue 2: Are the members of the Drug Formulary Committee in compliance with the Open Meeting Law, Minnesota Statutes, Chapter 13D, when they gather together before each regular meeting behind closed doors?

Both Mr. Borger and the DFC indicate that the members of the DFC gather before meetings to eat dinner. The Minnesota courts have indicated that the OML is not violated if the members of a body subject to the OML are at a social gathering together. See *St. Cloud Newspapers*, 332 N.W.2d at 7.

While the Commissioner accepts the statements on behalf of the members of the DFC that no business is conducted during dinner, the best way to avoid the appearance of a violation is to eat dinner in an open area. The Commissioner encourages the members of the DFC to change their dining area so that the public can monitor the conversations of the DFC members.

Issue 3: Are the members of the Drug Formulary Committee in compliance with Minnesota Statutes, section 13D.01, subdivision 6 when they review printed materials at a meeting but do not make those materials available to the public in the meeting room?

Section 13D.01, subdivision 6 requires that one copy of any materials provided to the members of a public body needs to be available in the meeting room for the public in attendance to review. If members receive data that are not public as that term is defined in Chapter 13, those not public data need not be provided to the public in attendance.

Mr. Borger stated that there have been some instances where members of the DFC were handed materials, reviewed the materials and returned the copies to staff. No copy of these materials was provided in the meeting room. When questioned about the practice, Commissioner Ludeman of the Department of Human Services wrote in a January 2, 2008, letter that

to the extent that printed materials used by the committees is prepared by contracted vendors, who view their materials as proprietary, and [sic] Department will be unable to make such materials available to the public.

In her response on behalf of the members of the DFC, Ms. Turner indicates that data classified as trade secret would not be provided in the meeting room.

The Commissioner notes that there is a difference between “proprietary materials” and data that are trade secrets. Minnesota Statutes, section 13.37 defines the term “trade secret” (subdivision 1(b)) and classifies trade secret data as private or nonpublic (subdivision 2). There are no similar provisions for “proprietary materials” and so those data are public under the presumption in section 13.03, subdivision 1.

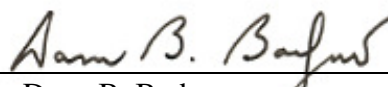
As Mr. Borger was unable to provide specific instances where public data were provided to members of the DFC but not to the public attending the meeting, the Commissioner is unable to conclude that the members of the DFC have violated section 13D.01, subdivision 6. The Commissioner encourages the members of the DFC to have staff help them determine if data provided by contract vendors meet the definition of “trade secret” in section 13.37. If the data provided by contract vendors do not meet the definition, then the data should be provided to the public in the meeting room in compliance with subdivision 6.

Opinion:

Based on the facts and information provided, my opinion on the issues that Mr. Borger raised is as follows:

1. The members of the Drug Formulary Committee are subject to the requirements of the Open Meeting Law, Minnesota Statutes, Chapter 13D.
2. The members of the Drug Formulary Committee are in compliance with the Open Meeting Law, Minnesota Statutes, Chapter 13D, when they gather together before each regular meeting behind closed doors so long as they do not conduct DFC business. The members of the DFC are encouraged to gather in open areas rather than behind closed doors before each regular meeting to avoid the appearance of an OML violation.
3. The members of the Drug Formulary Committee are in compliance with Minnesota Statutes, section 13D.01, subdivision 6 when they review printed materials containing data that are classified as not public at a meeting but do not make those materials available to the public in the meeting room.

Signed:


 Dana B. Badgerow
 Commissioner

Dated:

July 23, 2008